Supreme Court, U.S.
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No. 06-

IN THE
Supreme Court of the United States

G & T TERMINAL PACKAGING CO., INC.
and TRAY-WRAP, INC.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does extortion negate the willfulness necessary for breach of a Federal Statute, specifically 7 U.S.C. § 499b(4) (the Perishable Agricultural Commodities Act)?

2. Does extortion negate a duty to refrain from making payments, which would otherwise be a violation of 7 U.S.C. § 499b(4) of the Perishable Agricultural Commodities Act?

3. Does extortion, no matter what the degree, which results in economic hardship to the victim, rise to the level of "reasonable cause," as that phrase is used in 7 U.S.C. § 499b(4)?

CORPORATE DISCLOSURE STATEMENT

Neither G & T Terminal Packaging Co., Inc., nor Tray-Wrap, Inc., has a parent corporation. Furthermore, no publicly held company owns 10% or more of either petitioners' stock.

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OPINIONS AND ORDERS IN THIS CASE

The initial Decision of the Administrative Law Judge of the United States Department of Agriculture is reported at 64 Agric. Dec. 961 (2005) as United States Department of Agriculture v. G&T Terminal Packaging Co., Inc. and Tray-Wrap, Inc. The U.S.D.A. appealed the decision within the Agency and the reversal is reported at USDA Judicial Officer Decisions, under the Perishable Agricultural Commodities Act, on September 8, 2005, Docket No. D-03-0026 (*http://www.nationalaglawcenter.org/assets/decisions/gt.pdf*) The Second Circuit affirmed the September 8, 2005 decision of the Secretary of Agriculture, reported at 468 F.3d 86. *See* Appendices.

JURISDICTIONAL BASIS

This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Decision of the Administrative Law Judge in favor of the Petitioners was rendered on March 28, 2005. The decision by the United Stated Department of Agriculture before the Secretary of Agriculture was rendered on September 8, 2005 ruling against the Petitioners. The Court of Appeals for the Second Circuit affirmed the decision of the Secretary of Agriculture on November 3, 2006. The Plaintiff's filed a petition for panel rehearing and a petition for rehearing en banc was denied on February 8, 2007.

STATUTES AND REGULATION INVOLVED

The relevant portions of 18 U.S.C. § 1951, 5 U.S.C. § 558, 26 Code of Federal Regulations, Section 301.6651-1 and 7 U.S.C. § 499b may be found in Appendix E.

STATEMENT OF THE CASE

Petitioners respectfully bring to this Court's attention that this is believed to be one of the first times that a federal agency was indicted for racketeering. However, despite "rampant

corruption" (App. A at 2a) at the U.S.D.A. for "decades," (App. A at 2a) it is the produce merchants (Petitioners), not the U.S.D.A., who will be punished in this case, since they will deprived of their right to operate their businesses, because the U.S.D.A. did not prevent and/or terminate rampant corruption and extortion throughout its own agency.

This action arises from the U.S.D.A. seeking to put G&T Terminal Packaging Co., Inc. and Tray-Wrap, Inc. out of business, because, rather than accept responsibility for its misdeeds, the U.S.D.A. has decided to punish innocent parties, the Petitioners. At the hearing in this matter, the Administrative Law Judge found that "under these egregious conditions, it takes some chutzpah for the U.S.D.A. to seek to drive [G&T and Tray-Wrap] out of the fruit and vegetable business." (App. B at 186a). He also found that the Companies' employee, Anthony Spinale was a "victim of soft extortion from the cabal of convicted U.S.D.A. inspectors." (App. B at 180a).

The Second Circuit also found that the extortion was "real." (App. A at 25a). Thus, since the extortion perpetrated upon Petitioners is real, and a crime, the USDA, not Petitioners, were responsible, and is the guilty party.

The Second Circuit's affirmance of the Secretary's decision to revoke the Companies' licenses to operate is a death sentence in contravention of the decisions of this Court. If these Companies are put out of business by the U.S.D.A., more than 85 employees will lose their jobs – as well as numerous other employees of other companies in the Hunts Point Market in a similar circumstance. Some of the other companies are Cooseman Specialties, Inc., Kleiman & Hochberg, BT Produce Co., Inc., and M. Trombetta & Sons, Inc.

The events in this case arose out of "Operation Forbidden Fruit," an FBI "sting" operation at the Hunts Point Terminal Market in the Bronx. The U.S.D.A. claims that G&T and Tray-Wrap violated the Perishable Agricultural Commodities Act

("PACA") because they allegedly gave illegal bribes to U.S.D.A. produce inspectors so that the inspectors would falsify the inspections by downgrading the condition of the produce on the inspections and thus, the receivers would be able to obtain allowances from the shippers.

G&T has been a wholesaler and re-packer of potatoes since 1964; Tray-Wrap has been a wholesaler and re-packer of tomatoes since 1969, and both have maintained their operations in the Hunts Point Terminal Market, Bronx, New York Market since 1991 (App. B at 96a-98a).

As part of their business, when the Companies moved to Hunts Point in 1991, they began requesting inspections for their produce from the U.S.D.A. office in Hunts Point. The inspectors provided G&T and Tray-Wrap with inspections, but refused to provide accurate and timely inspections unless they were given money by the Companies. This practice was found to be extortion by all three lower courts –Administrative Law Judge William B. Moran (App. B at 180a), the Secretary of Agriculture, through its Judicial Officer William Jenson (App. C at 220a-221a, 229a), and the Second Circuit (App. A at 3a); and was found to have been going on for many years.

The underlying facts are that a U.S.D.A. inspector, William J. Cashin, was arrested on March 23, 1999 by the Federal Bureau of Investigation and the Inspector General's Office of the U.S.D.A. and charged with bribery and conspiracy to commit bribery (App. B at 37a). He decided to cooperate with the FBI and the Department of Justice to avoid a prison sentence. After his arrest, Mr. Cashin wore a 'wire' and later on a video tape device, which he used to secretly record his conversations with wholesalers in the Hunts Point Market (App. B at 37a-39a).

On or about October 27, 1999, as a result of Operation Forbidden Fruit, eight U.S.D.A. inspectors, all assigned to the U.S.D.A. Inspection Office in the Hunts Point Terminal Market,

were charged with accepting bribes and with a RICO conspiracy to downgrade the condition of the produce on the U.S.D.A. inspection reports, in return for cash payments, so that the receiver could obtain allowances from the shippers. Twelve merchants were charged with bribery as well. Mr. Spinale was one of the merchants charged with bribery of a public official (App. B at 28a-29a). Thereafter, the U.S.D.A. commenced disciplinary proceedings against all of the merchants/wholesalers to revoke their PACA licenses. G&T and Tray-Wrap were two Companies against whom the U.S.D.A. brought such proceedings (App. B at 28a-29a).

The U.S.D.A. alleged in its initial disciplinary complaint against G&T and Tray-Wrap, filed on June 4, 2003, that the Companies, acting through Anthony Spinale, made illegal cash payments to U.S.D.A. inspectors for the purpose of falsifying ten U.S.D.A. inspection reports so that G&T and Tray-Wrap could receive allowances from the shippers of the produce on those ten shipments. That complaint also stated that Mr. Spinale was indicted by the United States Attorney for the Southern District of New York, based on the same set of facts upon which the U.S.D.A. complaint was based. (App. B at 29a)

G&T and Tray-Wrap, in their initial answer to the disciplinary complaint, on June 25, 2003, contended that Mr. Spinale was not guilty, but pled guilty to a single count of bribery of a public official with regard to G&T, due to pressure put upon him by his attorney and due to his advanced age and poor health. All other criminal charges against Mr. Spinale, including all charges against Tray-Wrap, were dropped. As a result of his plea, Mr. Spinale did not serve a prison sentence, but was sentenced to one-year home confinement, five years probation and paid a $30,000.00 fine. (App. B at 186a-187a).

The PACA Hearing Before the ALJ

A six-day PACA disciplinary hearing was held before Administrative Law Judge William B. Moran from October 25, 2004 through November 1, 2004 (App. C at 203a). The U.S.D.A.'s main witness was William J. Cashin, the FBI informant. The Companies (the Respondents at the hearing) called six witnesses - Anthony Spinale, Mazie Faraci, President of Tray-Wrap, two former U.S.D.A. inspectors who were convicted of bribery, Edmund Esposito and Paul Cutler; a shipper of potatoes, Craig Bauer; and a broker of potatoes, Harris Cutler. On March 28, 2005, ALJ Moran dismissed the U.S.D.A.'s case, and issued a thorough, exhaustive and detailed 91 page decision, holding that the U.S.D.A. failed to show that G&T or Tray-Wrap violated §499 of the PACA, because they did not fail to perform a duty under the Act, since, *inter alia*, the U.S.D.A. inspectors extorted Mr. Spinale, G&T and Tray-Wrap and coerced them to pay money, not to downgrade the condition of the produce, but rather in order to obtain accurate and timely inspections. (App. B at 181a-185a).

The ALJ found, based in part on the testimony of three former U.S.D.A. inspectors who pled guilty to bribery, that in fact if the Companies did not pay the inspectors, they would receive inspection reports which showed the produce was in good condition when it was not, which would negatively impact their business.

The Appeal By The U.S.D.A. To The Judicial Officer

The U.S.D.A. appealed the decision within the Agency, to Judicial Officer William G. Jenson, who, on September 8, 2005, issued a Decision and Order, which did not reverse the ALJ finding of extortion, or any other Findings of Fact by the ALJ. (App. C at 220a-221a, 229a-230a). However, the Secretary found that even if Mr. Spinale, G&T or Tray-Wrap had been extorted by the U.S.D.A. inspectors to pay money in order to obtain accurate and timely inspections, they had violated §499

of the PACA because they failed to perform a duty under the Act, and revoked their licenses (App. C at 240a).

The Second Circuit Decision

The Companies timely appealed the Secretary's decision to the Second Circuit, which issued its decision on November 3, 2006. The Second Circuit did not overturn any of the Findings of Fact of the ALJ, which are not in dispute, but instead, drew its own conclusions from the same Findings of Fact, in contravention of the Statute, and affirmed the decision of the Agency, stripping both Mr. Spinale and the Companies of their licenses to do business (App. A at 1a).

Thereafter, the Petitioner timely filed a Petition for Panel Rehearing and Suggestion for Rehearing En Banc on December 15, 2006, which was denied on February 8, 2007 (App. D at 241a).

REASONS FOR GRANTING THE PETITION

Review by this Court is necessary because the Second Circuit failed to explain how the Secretary of Agriculture did not challenge Administrative Law Judge William B. Moran's credibility and fact findings, yet came to a different conclusion. Thus, the Second Circuit failed to follow the framework set forth by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) because the Agency decision was "arbitrary, capricious, or manifestly contrary to the statute."

Review by this Court is necessary to address two important issues posed by the Second Circuit's decision:

(1) The Second Circuit agreed with the U.S.D.A.'s position that individuals, not the government, are ultimately responsible to regulate the regulators, which would excuse the U.S.D.A.'s responsibility to regulate its own employees and inspectors. This seems to excuse the U.S.D.A.'s responsibility in the first instance to regulate its own inspectors.

As the Second Circuit noted, corruption at the U.S.D.A. was "rampant" and existed for "years if not decades." (App. A at 2a) Yet, the Agency and the Second Circuit concluded that Mr. Spinale had the responsibility to not only "resist" the extortion, but to report the illegal activities rather than expect the U.S.D.A. to regulate its own agency (App. A at 24a-26a).

Nevertheless, the Second Circuit did admit that Mr. Spinale did not have an affirmative obligation to report the illegal activities to any official body (App. A at 25a).

(2) If the view of the Second Circuit remains as valid law, it would mean that there are no set of circumstances that would ever excuse a PACA licensee from being victimized by corrupt inspectors.

I. The Second Circuit's Disregard of the Rampant Corruption Throughout the Agency And Punishment of the Victims, Warrants Review by this Court

The U.S. Attorney, and the FBI, have maintained that the entire U.S.D.A. inspection service at Hunts Point was operated as a Racketeering Operation, and indicted the former U.S.D.A. inspectors under the RICO Act (App. B at 146a-148a; 169a-170a). G&T and Tray-Wrap were victims of this corrupt operation, which existed for at least 20 years in the Hunts Point U.S.D.A. Office, under the nose of the U.S.D.A. (App. B at 51a-53a).

Former inspector Edmund Esposito admitted that he had a very expensive gambling habit. Undisputed testimony at the hearing found that three other U.S.D.A. inspectors were addicted to cocaine. Mr. Cashin was addicted to female "adult" entertainers (App. B at 151a). In fact, one inspector was arrested and charged with child molestation. Mr. Spinale, G&T and Tray-Wrap were merely victims of the bribe-taking cabal of corrupt inspectors consisting of drug-users, gamblers, womanizers, a child molester, and pornography users, all of whom extorted the petitioners.

Further, the Companies proved at their disciplinary hearing that the U.S.D.A., at a supervisory level, actually instructed their inspectors to falsify reports on a routine basis, in order to protect themselves. The testimony at the hearing unequivocally demonstrated that the entire U.S.D.A. inspection service at the Hunts Point Market was conducted in a corrupt and negligent manner, and with complete disregard for proper and accurate procedures in performing inspections (App. B at 62a-64a). The actions of the U.S.D.A. inspectors destroyed the integrity of the inspection process and defeated the purpose of 7 U.S.C. §499a et seq.

Three former U.S.D.A. inspectors, who were arrested and indicted as part of "Operation Forbidden Fruit," (including the U.S.D.A.'s star witness, William J. Cashin) all testified (App. B at 32a (Cashin), 147a (Esposito); 169a (Cutler) that their superiors at the Hunts Point Market U.S.D.A. office instructed them to alter and falsify inspection reports to the harm of the merchant, and to take "shortcuts" when conducting inspections (App. B at 67a, 173a). Thus, the Secretary's conclusions – affirmed by the Second Circuit - that Mr. Spinale's actions harmed the integrity of the inspection process when those in charge of the Hunts Point U.S.D.A. office instructed their inspectors to alter and falsify reports and to take short-cuts in conducting inspections is clearly contrary to the statute.

The former U.S.D.A. inspectors and the entire U.S.D.A. office were corrupt to the core. As the ALJ found: "The breadth of the indictments and convictions demonstrates that the Hunts Point U.S.D.A. office was contaminated with corruption and that other problems with inspections existed such as faking the number of items inspected and rigging the outcome when grade defects are alleged." (App. B at 186a) The ALJ noted that "this was not a case of a rogue inspector, acting alone." (App. B at 186a).

II. Review by This Court is Warranted Because The Perishable Agricultural Commodities Act Was Not Violated Herein

The PACA "does not specifically provide that a payment to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities is a violation of the PACA." (App. B at 212a). However, despite that, the Second Circuit upheld the Secretary's finding that the Companies violated the Act. A review of the applicable statute clearly indicates that neither Mr. Spinale nor the Companies violated the Act. They:

1 - never made a false or misleading statement

2 - never failed or refused to account and to make full payment involving any produce transaction

3 - they never failed, *without reasonable cause*, to perform any specification or duty involving any produce transaction.

The ALJ found that "it would not have been unreasonable for the Court to have entertained a motion for dismissal by reason of the government's failure to present a prima facie case." (App. B at 95a-96a). Judge Moran found that when G&T and Tray-Wrap ("the companies") gave money to the U.S.D.A. inspectors, it was not a "failure to perform a duty" because the U.S.D.A.'s case rested on 2 theories (App. B at 181a-182a) - Cashin's testimony and Mr. Spinale's guilty plea:

1) Judge Moran found Mr. Cashin's testimony not credible whenever it conflicted with that of Mr. Spinale (App. B at 181a-183a), and this finding was upheld by the Secretary of Agriculture (App. C at 228a).

2) Judge Moran found that Mr. Spinale's guilty plea was insufficient to prove that a violation of the Act occurred (App. B at 187a-188a; 197a-198a).

Consequently, the ALJ found that the U.S.D.A. did not prove that the Companies failed to perform a duty on the basis of the 10 payments, which comprised the U.S.D.A.'s complaint. If payments by the Companies resulted in accurate reports, then, such payments could not be included in the duties imposed by the Act. Thus, if the inspection certificate accurately reflects the produce inspected, then the purpose and meaning of the Act has been adhered to.

The Second Circuit held that Mr. Spinale had an implied duty to refrain from paying U.S.D.A. inspectors, and that extortion is not a "reasonable cause" (App A at 26a). This is illogical, as well as arbitrary and capricious. If Mr. Spinale (and the Companies) failed to perform any duty, which the Companies are alleging they did not), there was "reasonable cause" (§499(b)(4) of the PACA); i.e. extortion, as to why Mr. Spinale was forced to give money to Mr. Cashin. Thus, it is hard to imagine how coercion and extortion could not be considered a "reasonable cause" under these circumstances.

There is no case law which defines "reasonable cause" as it is set forth in 7 U.S.C. §499b(4). Moreover, there is nothing in the statutory background of the PACA which specifically defines that term as it is used in section 2(4) of the PACA.

On April 6, 1942, 7 U.S.C. §499b(4) was amended to insert "or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction." (56 Stat. 200). The reason why it was added was to rectify a decision of a three-judge Federal court, which decided that the word "account," as used in §499b(4), did not include making a payment. The U.S.D.A. concluded that such a decision would "disrupt the efficient administration and enforcement of the act," because after that decision it would have been sufficient for anyone selling goods for the account of others to transmit merely an account of sales

showing the amount due without making any payment, and that anyone who buys fresh fruits and vegetables would be able to furnish a mere statement to the seller that a certain amount is due. The U.S.D.A. asked Congress to immediately amend 7 U.S.C. §499b(4) to insert "and make full payment" and "or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction" (77th Congress, 2nd Session, House Report No. 1840, February 27, 1942; 77th Congress 2d Session, Senate Report No. 1188, March 23, 1942).

Consequently, the entire purpose of the amendment was to ensure that payment was made for produce received, which the U.S.D.A. felt was necessary due to a Court decision which cast the wording of the Act in doubt.

"Reasonable cause" has been distinctly defined in other statutes. For example, the Treasury Regulations for failure to pay taxes to the IRS, 26 C.F.R. § 301.6651-1 defines what constitutes reasonable cause for failure to timely pay taxes: "If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause."

Therefore, "ordinary business care and prudence" is considered by the IRS to be "reasonable cause" sufficient to excuse failure to file a return and failure to pay taxes. Additionally, reasonable cause is found if the taxpayer could demonstrate "an undue hardship." Mr. Spinale showed "ordinary business care and prudence," in first attempting to obtain a fair, accurate and timely inspection report through the channels provided by the U.S.D.A. When he was still unable to obtain a fair, accurate and timely report through those means, he then succumbed to the U.S.D.A. inspectors' extortion in order to obtain fair, accurate and timely reports. Moreover, if the companies did not submit to the extortion demands, they would

have sustained significant financial losses, which should be considered "undue hardship." For example, if the produce was in bad condition, but the inspectors wrote it up as good, Petitioners would be overpaying the Seller for the Produce, would be unable to sell the produce, and thus would lose money. Further, the U.S.D.A. inspectors' extortion cost the general public millions and millions of dollars.

The Second Circuit, in *McMahan v. Commissioner of Internal Revenue*, 111 F.3d 366, 369 (2nd Cir., 1997), also held that circumstances found to be "reasonable cause" "arise as a result of factors beyond a taxpayer's control." Similarly, the extortion by the U.S.D.A. inspectors was "beyond [the companies'] control."

Pursuant to the Congressional purpose of the PACA, and the purpose of any act that contains a reasonable cause requirement, extortion of any kind rises to the level of reasonable cause.

III. Extortion is "Reasonable Cause" And Negated The Willfulness Required by Statute

The definition of "extortion" in Black's Law Dictionary is: "The obtaining of property from another ... under color of official right." If extortion and "avoidance of ... inaccurate United States Department of Agriculture inspections certificates" are not reasonable cause, then what would be considered "reasonable cause." Mr. Spinale was extorted because the U.S.D.A. inspectors used their official position to obtain money from him. The companies in this case were extorted *in order to obtain* fair, accurate and timely reports.

Regarding extortion, the Second Circuit, in *United States v. Brecht*, 540 F.2d 45, 52 (2nd Cir., 1976), cert. denied, 429 U.S. 1123, (1977), held that the element of "fear" in order to constitute "extortion," as required by the Hobbs Act (18 U.S.C.

§1951), "can be satisfied by putting the victim in fear of economic loss."

Additionally, "the victim must have reasonably believed: 'first, that the defendant had the power to harm the victim, and second, that the defendant would exploit that power to the victim's detriment.'" [citation omitted] *Calabrese v. CSC Holdings, Inc.*, 283 F. Supp.2d 797 (E.D.N.Y., 2003). Thus, the companies' fear of an inability to compete, causing substantial financial losses with the possibility of going out of business, constitutes extortion, and as such, can be considered reasonable cause.

The Second Circuit's affirmance of the Secretary's decision to deprive petitioners of their licenses to do business where an honest businessman is being "held-up" and extorted by a completely corrupt federal agency, should be considered an "arbitrary and capricious" decision; or in the alternative, such extortion or crime should rise to the level of "reasonable cause," which would excuse a breach of an implied duty.

G&T and Tray Wrap would never have been able to obtain fair, accurate and timely inspections unless they acquiesced to the extortionate demands of the U.S.D.A. inspectors. Hence, they would have been unable to compete with other businesses in the area.

Even after G&T and Tray-Wrap yielded to the inspectors' extortion demands, they were still facing financial difficulties and were unable to compete, because they were only receiving fair, accurate and timely inspections - not downgraded inspections. Yet 60 to 75% of the companies' competition, in the Hunts Point Terminal Market, (App. B at 77a) were paying the inspectors for downgraded inspections and received allowances based on false reports, which G&T and Tray-Wrap were not aware of.

Columbia Packing Company, Inc. v. U.S.D.A., 562 F.2d 495 (1st Cir., 1977), supports the Companies' position that a finding of extortion warranted dismissal of the complaint. The ALJ held:

> In *Columbia Packing Company, Inc. v. U.S.D.A.*, 563 F. 2d 495 (1st Cir. 1977), that court noted, in the context of a FOIA request, that the packing company, which as with the Respondents here were at risk of losing the federal inspection service, had a right to see the personnel records of the former U.S.D.A. meat inspectors who had been convicted of bribery, *in order to show that the company was a victim of extortion.* The court added that if those records supported the contention that the company was being extorted, that would present "a posture 'tending to mitigate its conduct.' " *Id.* at 498. *Further, the court expressed that if the inspectors were engaged in extortion, the packing company should prevail. Id.* at 501.

(Emphasis in original) (App. B at 178a).

Thus the Federal Court of Appeals held that the company had a right to show they were a victim of extortion, and if they could show that the inspectors were engaged in extortion, the company should prevail. This conflicts with the Second Circuit's decision in this case, and warrants a review of this Court.

The Second Circuit summarized petitioners' arguments that since "an inspector's duty is to provide timely and accurate reports, the Secretary's construction is unreasonable." However, as set forth by Judge Moran: "the central contention of [G&T and Tray-Wrap] is that they were being extorted by the Agriculture inspectors in that, if they wanted an accurate inspection of the produce, they would have to pay off the inspectors to receive one" (App. B at 197a).

In this case, the ALJ made a finding of extortion, and specifically found that there was no bribery. *The ALJ herein did not find that extortion was a defense to the bribery, but found that bribery did not exist herein:* "For the many reasons set forth in this decision this Court finds that bribery has not been established (App. B at 180a).

The ALJ concluded: "Other witnesses ... all provided substantial support for this Court to conclude that Cashin's operation was nothing more than a "holdup" of Mr. Spinale, with Cashin only missing the formality of wearing a mask." (App. B at 183a).

If the companies failed to succumb to the extortion, they would have received inaccurate inspection reports (certainly not envisioned by the drafters of the Act) and they would have been unable to sell their produce for a competitive price.

Pursuant to the PACA (7 U.S.C. §499b(4) the breach of a duty must be willful. Mr. Spinale's purpose or motive was to gain a fair and accurate inspection, not to knowingly violate 7 U.S.C. §499(b)(4), therefore his actions were anything but willful. The Secretary of Agriculture conceded that Mr. Spinale was being coerced into giving money to inspectors (App. C at 220a; 229a-230a); therefore, he was not doing it willfully in violation of 7 U.S.C. §499(b). If one is extorted, as the Second Circuit admitted, it is impossible to see how an individual can commit "knowing and wilful" acts. Further, under the wording of the Act itself, Mr. Spinale did not "fail to perform" "any specification or duty" (§499(b)) called for.

Whether the act of extortion occurred at physical gunpoint or economic gunpoint, it negates the willfulness requirement of the statute, and thus both the decision of the Secretary and of the Second Circuit decision are "arbitrary, capricious and manifestly contrary to statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Administrative Procedure Act, 5 U.S.C. §558 states that a license issued by a governmental agency cannot be suspended or revoked where there is no "willfulness" unless "the licensee has been given — (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements."

The companies were never given that opportunity by the U.S.D.A., and the finding of extortion negates the willfulness. Since the Secretary failed to comply with 5 U.S.C. §558, the Second Circuit decision is contrary to that statute as well.

Although the inspectors may not have specifically threatened Mr. Spinale with the loss or destruction of his business, by failing to provide the companies with the inspections to which they were entitled, Mr. Spinale was being threatened with significant losses in his business.

As Judge Moran put it:

> Further, the contention advanced by U.S.D.A., that Mr. Spinale should have stood up to the corrupt cabal of inspectors, shows a remarkable disconnect from the real world by those have not had to deal with it, except as regulators. It borders on the outrageous to suggest that Mr. Spinale should have taken a more courageous stance in dealing with a corrupt group of federal inspectors, especially not knowing the extent and depth of corruption that he was facing. First, he had already learned that the bureaucracy was much more potent than him. Though many witnesses acknowledged that he is an expert where tomatoes and potatoes are concerned, Mr. Spinale's unrebutted testimony established that he could never win when he appealed the results of an inspection. Losing against the bureaucracy is not exactly a new

> story. Further, when he voiced other complaints to the U.S.D.A., his concerns were brushed aside.

(App. B at 185a-187a)

The facts involving one of the tomato loads which comprised the U.S.D.A. complaint is clear proof of the extortion to which petitioners were subjected. The ALJ found this load "particularly instructive about what was actually going on in this case" (App. B at 114a). The unrebutted testimony established that one particular load of tomatoes was a free load from the shipper; that is, Tray-Wrap was not charged for the load. The ALJ found that Mr. Cashin went to Tray-Wrap's place of business unsolicited and told Mr. Spinale that he needed something to look at. Tray-Wrap could derive no benefit whatsoever from a U.S.D.A. inspection of the free load, and never showed the inspection to the shipper since they could not obtain an allowance on a free load (App. B at 117a-118a). The ALJ concluded that:

> Cashin was involved in what amounted to a hold-up of at least some wholesalers, like Mr. Spinale. With no inspection requested, and therefore no plausible assertion for the U.S.D.A. to argue that Mr. Spinale was scheming to have produce evaluated to be less than its true condition, Cashin was clearly working his shakedown of wholesalers.

(App. B at 66a).

IV. The U.S.D.A. Itself Defeated the Integrity of the Act

The conduct of the U.S.D.A. inspectors should mitigate any findings that the Companies acted with the intent to defeat the integrity of the Act. The U.S.D.A. is perhaps the most inappropriate party to bring this action. But for the actions of the U.S.D.A.'s inspectors coercing and extorting money from wholesalers at the Hunts Point Terminal Market, Mr. Spinale would never have given money to Mr. Cashin. Mr. Spinale's

difficulties were a direct result of rampant corruption and extortion within the Agency itself. The only conclusion that can be drawn from the circumstances described herein is that the U.S.D.A. itself violated the integrity of the Act.

The U.S.D.A. itself "undermines the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificate . . ." (App. C at 232a) by having permitted U.S.D.A. inspectors to conduct a racketeering operation at the U.S.D.A. office for at least twenty years, and by ordering them to falsify reports. Clearly, the U.S.D.A. undermined the integrity and objectivity of its own agency by permitting these inspectors to extort Mr. Spinale, and others.

In light of the unrefuted findings of the ALJ that (1) Mr. Spinale could not obtain an accurate inspection without giving extortion money to U.S.D.A. inspectors and (2) the entire U.S.D.A. inspection service was corrupt (App. B at 186a-187a) , Mr. Spinale's actions certainly did not undermine "the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture inspector." (App. C at 220a). Beyond doubt, the trust placed in the inspection process was non-existent by the time Mr. Spinale was forced to make payments to Mr. Cashin.

"The principle of an honest inspectorate takes on an additional gravitas when it is determined as here that soft extortion not bribery, was at work." (App. B at 197a, fn. 129).

V. The Congressional Purpose of the PACA Was Disregarded By the Second Circuit

Review by this Court is necessary because the Second Circuit completely disregarded the Congressional purposes to be accomplished by the PACA, as set forth in the 1930 report of the Department of Agriculture (and is quoted in 73rd Congress, 2nd Session, Senate Report, Cal. No. 581, Report No. 554, March 20, 1934):

> The Perishable Agricultural Commodities Act was passed to suppress certain unfair and fraudulent practices in the marketing of fresh fruits and vegetables . . . It declares certain things to be unlawful, the most important being for commission merchants or brokers to make a fraudulent charge in connection with the handling of fresh fruits and vegetables for the account of another; for buyers to refuse to accept delivery after purchase without reasonable cause; for shippers to fail to deliver in accordance with the terms of the contract without reasonable cause; for commission merchants to discard, dump, or destroy such commodities without reasonable cause . . . ; and for a commission merchant, dealer or broker to make false and misleading statements, concerning the condition, quality, quantity or disposition of such commodities or to fail or to refuse correctly to account promptly, including payment.

The purpose of the inspection service is set forth in the Seventy-First Congress, Session III, Ch. 341, p. 418 (1930): "For enabling the Secretary of Agriculture . . . to investigate and certify to shippers and other interested parties the class, quality and/or condition of cotton, tobacco, fruits and vegetables . . . and other perishable farm products . . ."

Thus, where the inspection certificate accurately reflects the condition of the produce, it cannot prejudice or harm the shipper or receiver. A duty to refrain from making payments to inspectors when the only consequence of those payments was fair, accurate and timely inspections was not envisioned to be a violation of the PACA by Congress.

This Court has routinely held that a statute must be:

> sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties' [and] a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its applications, violates the first essential of due process of law.

Connally v. General Constr. Co., 169 U.S. 385, 391, (1926). 7 U.S.C. § 499(b)(4), as interpreted by the Second Circuit, is in conflict with the *Connally* decision of this Court.

VI. The Second Circuit Adopted, but Completely Disregarded, The Findings of Fact Of the Administrative Law Judge – In Contravention of the Relevant Decisions of This Court

Because the Secretary, in its decision, failed to identify what constitutes "reasonable cause" under the statute, the Second Circuit did not employ the *Chevron* standard when reviewing that aspect of the Secretary's decision, but rather held that it reached the same conclusion as the Secretary using a "*de novo*" (App. A at 24a) standard.

Thus, the Second Circuit, while affirming the specific factual findings of Judge Moran, nevertheless drew its own factual findings regarding the testimony of the witnesses, in contravention of *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), which sets the standard for the weight to be

given the trial examiner's (the ALJ's) findings, and the authority of the agency in reviewing the trial examiner's findings:

> It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report. The conclusion is confirmed by the indications in the legislative history that *enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.*

(Emphasis added).

> This aim was set forth by the Attorney General's Committee on Administrative Procedure: 'In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, *on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.*'

(Emphasis added). (@ 496).

This Court went on to hold that "Nothing [in the APA] suggests that reviewing courts should not give to the examiner's report such probative force as it intrinsically commands." (@ 495)

This Court goes on to conclude:

> The committee reports also make it clear that the sponsors of the legislation thought the statutes gave significance to the findings of examiners. Thus, the

> Senate Committee responsible for the Administrative Procedure Act explained in its report that *examiners' decisions 'would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing.'*

(Emphasis added) (@496).

The ALJ found that the U.S.D.A. failed to prove that bribery took place; failed to present a prima facie case, and found that the Companies established by "unrebutted evidence" (App. B at 180a) that their representative, Anthony Spinale, was extorted by U.S.D.A. inspectors, and forced to make payments in order to obtain accurate U.S.D.A. inspection reports.

Further, the testimony of the broker of all of the potato shipments which comprised the U.S.D.A. complaint (Harris Cutler), and the shipper of four of the potato shipments (Craig Bauer) confirmed, and the ALJ concluded, that all of the inspections entered into evidence at the hearing accurately reflected the conditions of the shipments inspected, and that all of the shippers received the full amount due on all the shipments (App. B at 128a-148a; 163a-169a).

The ALJ concluded "when G&T asks for an allowance, such a claim is consistent with the condition of the produce at other locations where the same produce has been sent. That is, one does not find G&T having a problem with a load of produce, while others who receive shipments from the same farm have no problems with it." (App. B at 130a).

The Second Circuit's reliance on one statement by a former inspector, Edmund Esposito, that he gave Mr. Spinale the "a benefit of doubt on inspections" because he "got paid" is misplaced (App. A at 12a). The Second Circuit took that statement out of context when analyzed in light of Mr. Esposito's

testimony as a whole, and in light of the ALJ's interpretation of the testimony. Mr. Esposito emphasized that Mr. Spinale never asked him to alter or falsify an inspection, and also emphatically testified that he never downgraded an inspection for Mr. Spinale, which was found numerous times by the ALJ (App. B at 154a).

Further, Mr. Esposito's statement does not mean that it was Mr. Spinale's intent to influence the outcome of the inspection. Mr. Esposito's statement reflects *his* intent, not that of Mr. Spinale, and should not be used to support the conclusion that petitioners willfully violated the act. That is, petitioners and their employees are being punished because the U.S.D.A. was corrupt.

Additionally, the Second Circuit summarized the testimony of William Cashin, the former inspector and government witness, apparently taking that testimony into consideration in their decision (App. A at 12a-14a). Yet, Mr. Cashin's testimony was completely discredited by Judge Moran. Since Judge Moran's credibility findings were adopted by both the Secretary of Agriculture and the Second Circuit itself, the Second Circuit should not have even considered Mr. Cashin's testimony. Thus, the Second Circuit completely disregarded this Court's holdings in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496, (1951). The ALJ concluded that the totality of the evidence in the record "supports the Court's conclusion . . . that each of the inspection certificates in this Complaint reflected accurate descriptions of the state of the produce inspected." (App. B at 62a, fn. 42; 119a; 138a-139a). The ALJ also found that Mr. Spinale was credible when he "denied ever receiving an inspection that reflected a condition that was worse than the actual condition of the produce." (App. B at 105a-106a).

The ALJ held that the "U.S.D.A. [never] demonstrated a single instance when Mr. Spinale was involved in a produce

inspection which downgraded produce and made it appear in poorer condition than it really was." (App. B at 34a). Judge Moran found:

> Mr. Cashin's *general assertions* that Mr. Spinale attempted to influence the percentage of defects found in inspections . . . do not speak to the specific allegations in this Complaint ... The Complaint alleges *specific* "Bribes" on *specific* dates and that is what the government is obligated to prove by a preponderance of the evidence.

(App. B at 42a).

The trier of fact concluded: "**It is of particular importance to note here that Cashin *never* directly asserted that he increased the percentage of defects *for any specific load of produce that he inspected for Mr. Spinale*.**" (Emphasis in original) (App. B at 36a).

In light of said factual conclusion on the record, the conclusion drawn by the Court of Appeals that "strict impartiality and secret cash payments do not easily co-exist" (App. A at 22a) has no basis in the facts of the record. Since the ALJ's findings of fact were never overturned, they should have been adhered to.

VII. Contrary to the Second Circuit Conclusions:
a) Petitioners Never Received Any Benefit and
b) Mr. Spinale Had No Realistic Choices

"Mr. Spinale, while he felt compelled to pay Cashin's personal tariff, never acted to influence the inspection of produce to have it reflect anything other than its true condition." (App. B at 134a). The ALJ found that "in no instance was Mr. Spinale benefiting from those visits in critical ways that U.S.D.A. asserts [i.e] ... in no instance ... did Mr. Spinale seek ***or obtain*** from Cashin an inspection report which downgraded a load of produce from its actual condition." (App. B at 183a-184a). [Emphasis added].

The Secretary clearly adopted the ALJ's findings of fact; and, the ALJ, who viewed the witnesses and heard the testimony *did not conclude* that "Spinale received additional benefits from the inspectors he paid." (App. A at 22a) On the contrary, the ALJ's fact conclusions were that Mr. Spinale did not receive any additional benefits.

The Second Circuit concluded that Mr. Spinale did have choices about how to respond to the extortionate demands, concluding that one of the choices was to report the illegal activities to some official body (App. A at 25a). Although the Second Circuit conceded that Mr. Spinale did not have an affirmative obligation to do so, they nevertheless concluded that his failure to do so and make the payments instead was a "choice," and supported the Secretary's decision (App. A at 26a). Thus, the Second Circuit is requiring Mr. Spinale to "regulate the regulators," which is "arbitrary, capricious and contrary to statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). As the Second Circuit admitted, there is no law requiring Mr. Spinale to report the illegal activities, yet he is being stripped of his livelihood because he did not do so (App. A at 25a). The ALJ's conclusion was:

> the U.S.D.A.'s position that even if the Respondents' contentions that they were being extorted to obtain an accurate inspection are true, then these individuals had a duty to stand up against the extorting inspectors. Thus, it is accurate to *state* that Agriculture contends, from the Court's understanding of its argument, that the *Respondents had a duty to regulate the regulators.*

(Emphasis in original) (ALJ 197a-198a)

In fact the record indicates that Mr. Spinale did complain to the Officer in Charge of the U.S.D.A. Hunts Point Office regarding the delay in the inspections and inaccurate inspections. (App. B at 102a-103a).

The Administrative Law Judge concluded that it would be unconscionable to expect Mr. Spinale to have reported the inspectors to "higher-ups" at the U.S.D.A.: "It borders on the outrageous to suggest that Mr. Spinale should have taken a more courageous stance in dealing with a corrupt group of federal inspectors, especially not knowing the extent and depth of corruption that he was facing." (App. B at 185a) Supervisors at the Hunts Point Market and U.S.D.A. employees and supervisors in Washington, D.C. were also involved in the extortion and racketeering. If Mr. Spinale had reported the illegal activities to an official body, it could have reached the corrupt "higher-ups" at the U.S.D.A., and if that happened, who knows what the fate of Mr. Spinale would have been.

Moreover, Mr. Spinale attempted to work within the system, by calling for an appeal inspection, and then an informal review from Washington, all to no avail (App. B at 103a). The ALJ noted that when Mr. Spinale first came to Hunts Point in 1991 he believed that "he could not receive a fair inspection as he found himself always disagreeing with the inspectors' evaluations" and when "he requested an appeal inspection [the inspectors who performed the appeal] always affirmed the original inspector's determination." (App. B at 102a) Then Mr. Spinale, "on occasion" "would call for an informal review, which is the next step after an appeal inspection [however those inspectors] would concur with the earlier inspections' conclusions." (App. B at 103a)

Petitioners were victimized by the corrupt inspectors and Mr. Spinale believed that he had no choice other than to make the payments. Judge Moran found: "That Cashin used the phrase

'shaking people down' reveals that it was the inspectors who were driving the operation, and, at least in the case of Mr. Spinale, the wholesaler was the victim." (App. B at 83a)

The Second Circuit's conclusion that extortion which causes severe economic hardship is insufficient to rise to "reasonable cause" (App. A at 24a-25a) is arbitrary and capricious because the extortionate tactics of the corrupt U.S.D.A. inspectors actually resulted in punishment of the victim. Thus, their finding was "contrary to statute." *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., supra.*

To close these companies down when in the real world they had no choice is "arbitrary and capricious" in and of itself.

VIII. The Sanction Herein Warrants Review by this Court

It is also important for this Court to review this matter, because the sanction of closing down the Companies' businesses and banning Mr. Spinale from working in the produce industry is unwarranted and inconsistent with the decisions of this Court.

As the ALJ noted: "Where the issue is the appropriateness of revoking PACA licenses and given that the statutory provisions provide that a license may be revoked where there are such violations, it is incumbent upon this Court to fully appreciate the circumstances surrounding the illegal payments." Judge Moran went on to cite a PACA decision, *S. S. Linn County, Inc.*, 50 Agric. Dec. 473, 476 (1991) , which held:

> the sanction in each case is to be determined by examining the nature of the violations in relation to the remedial purpose of the regulatory statute involved along with all circumstances always giving appropriate weight to the recommendations of the administrative officials charged with responsibility for achieving the Congressional purpose.

(App. B at 198a).

IX. A Guilty Plea is Not Equivalent to a Conviction After Trial And Should Not be Accorded the Same Weight Circumstances Surrounding the Plea Are Relevant

The ALJ concluded that factors such as one's age, the unpredictability of a jury's decision and the enormous cost of a criminal trial are "real world considerations" that may induce an innocent person facing criminal charges to plead guilty to avoid jail time:

> When . . . real world considerations are juxtaposed against the option of pleading to a single count and the elimination of any jail time, it would not be irrational for one to 'choose' to plead guilty. Indeed it can be credibly asserted that it would be an irrational decision for an innocent person to refuse such a plea arrangement.

(App. B at 188a).

> . . . Mr. Spinale's guilty plea to *a single* count of the nine count indictment, the Court [noted that] . . . [u]pon finishing his plea, and without interruption nor prompting by any question, Mr. Spinale *immediately* added: 'Your Honor, I would like to state I never intended to defraud the shippers who had sent me the produce.'

(App. B at 187a-188a).

The ALJ also noted:

> Perhaps foreshadowing a recognized weakness with its own case, U.S.D.A. attempted to avoid entirely the burden of proving violations by Mr. Spinale by bootstrapping the single plea and converting it into its entire case.

(App. B at 187a).

The ALJ also found that: "while a guilty plea serves as an admission, many jurisdictions do not regard it as conclusive in subsequent civil proceedings." (App. B at 199a). Further, in New York, a party asserting the preclusive effect of a guilty plea, "must demonstrate that the issue is identical to and necessarily decided at the prior proceeding, and further that the party seeking to be precluded from re-litigating the issue had a full and fair opportunity to contest it." (App. B at 199a). Of course, that is not the case herein, since extortion was found at the administrative hearing; whereas there was no mention of extortion in Mr. Spinale's criminal proceeding. Mr. Spinale could not claim extortion in his criminal proceeding because he pled guilty.

A law review article which the ALJ made reference to in its decision (App. B at 200a) *The Effect of Criminal Guilty Please in Administrative Hearings*, 22 Colo. Law. 1889 (Sept., 1993), concluded that:

> a respondent [in an administrative hearing] will have an opportunity to explain the plea of guilty and that the plea was entered despite the fact that the respondent, then and now, maintains his or her innocence. The licensee may explain the reasons for entering into the plea agreement and is not precluded from presenting evidence that the licensee did not commit the act charged.

Mr. Spinale only pled guilty to Count 9 of the indictment (App. B at 187a), and the Government's witness, Mr. Cashin unequivocally testified that particular inspection (App. B at 48a fn22) was an accurate inspection report.

In response to a question as to why he paid Mr. Cashin, Mr. Spinale replied: "I call it soft extortion, and it was something you had to do if you wanted [to] run a successful business. *It was just a necessity.*" (Emphasis added) (As paraphrased by the ALJ, App. A at 10a).

Without making those payments to the inspectors, G&T and Tray-Wrap would have gone out of business. No one knows how many wholesalers in the New York area went out of business because of the admitted racketeering enterprise which was occurring at the Hunts Point U.S.D.A. office.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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